LC Paper No. CB(2)2214/98-99(01)

Theft (Amendment) Bill
Proposed offence of "Fraud"

Introduction

During the last meeting held with the Bills Committee, the Administration explained and the Bills Committee accepted why the words "the past, the present or the future" in the proposed definition of the term "deceit" should be retained. The Administration also explained to the Bills Committee the reason for certain consequential amendments in various ordinances relating to merchant shipping.

2. The Bills Committee further requested the Administration to revert on the following matters pertaining to the word "opinion" in the same proposed definition, having regard to

(a) the Law Reform Commission's expressed view in its report that "Commercial claims that a particular product is 'the best' are matters better left to consumer protection measures and we do not intend that such conduct should fall within our proposed offence of fraud;"

(b) the existing definition of "deception" in section 17 of the Theft Ordinance, which mirrors the proposed definition of "deceit;"

(c) the changed social attitude of the community regarding misrepresentation of opinion such as a retailer making a 'trader's-puff' with a view to selling an item of merchandise.

The LRC view

3. The Administration is of the view that whether or not 'trader's-puff' is to amount to a representation which could result in a prosecution for the offence of fraud, depends on the facts and circumstances of the particular case. The Administration would agree that a 'trader's puff' such as "these apples are the best" is not something that should be within the province of the criminal law, and it is not intended that this type of representation be the subject of prosecution, if proven to be a false representation, but the difficulty is where to 'draw the line.' As members pointed out at the last meeting, it is difficult to limit what is and is not within the term "opinion" whereas the statement of a fruit vendor who claims his apples are the best in the market would be treated with some scepticism by a prospective customer, the prospective customer of a diamond merchant, who is told that the diamonds he is being shown are of the best quality, may have little choice but to rely on the veracity of the statement made to him, and if this results in him handing over thousands of dollars for what were in fact poor quality stones of considerably less value, may justifiably expect the criminal law to intervene.

4. As the law in respect of the offence of obtaining property by deception (section 17 of the Theft Ordinance) presently stands however, the fruit vendor if he sells rotten apples which he had suggested were 'the best,' and the diamond merchant who deliberately misrepresents the quality of his merchandise, are equally liable to prosecution for this offence, although the fruit vendor is unlikely to be prosecuted because of the trivial nature of the offence, and in respect of the diamond merchant, it would be encumbent upon the prosecution to prove beyond a reasonable doubt that the misrepresentation was intentional.

5. One suggestion that was mentioned at the last meeting, but not fully developed, was that it could be made clear both in the speech introducing the bill and in the explanatory memorandum, as well as by Honourable Members in debate, what the new offence was not intended to cover.

Deception

6. There is a need for consistency in legislation. The definition of deception includes the term "facts or opinion" if the word opinion was omitted from the definition of "deceit" in the new section 16A, it would differ from, and therefore be inconsistent with, the definition of "deception" in this one respect.

The attitude of the community

7. The case of *Bryan* referred to at the last meeting, was decided over 100 years ago. The Administration would point out that society has moved on considerably since then, and in the vibrant commercial centre that is Hong Kong trust in business relying on the statements and opinions of experts in a particular field are essential for the satisfactory transaction of business. In *HKSAR v. LEUNG Yuen-keung* Criminal Appeal No. 211 of 1998 [unreported] the Court of Appeal dealing with the diamond trade, said that

> *"[d]iamond trading, as it is conducted is predicated on trust.."*

These comments are equally applicable to many other forms of commercial activity in Hong Kong, including for example the securities and banking industries, the import-export business, the travel industry, the electrical retail business and so on.

8. Whilst certain provisions in the Sale of Goods Ordinance Cap. 26 do provide some limited protection for consumers, they are dependent upon the consumer being prepared to initiate action and to follow it through in what is sometimes a long drawn-out and often expensive process, there are occasions when the conduct the subject of complaint is so serious, so far beyond what is sometimes referred to as 'sharp business practice' that immediate intervention by one or other of the law enforcement agencies leading to a prosecution is called for.

Conclusion

9. The Administration is of the view that the draft definition of “deceit” including the reference to “opinion” should remain intact, not only because it will mean that it is consistent with the mirror provision in section 17 of the Theft Ordinance, but also because it is a reflection of what the community expects, and that is that those engaged in business will act and honestly, in the knowledge that if their conduct is not up to the standard expected by the community then the criminal law will intervene.

Department of Justice
June 1999.

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

1998, No.211
(Criminal)

BETWEEN

HKSAR

and

LEUNG YUEN-KEUNG

Coram: Hon. Power, V.-P., Mayo & Stuart-Moore, JJ.A.
Date of Hearing: 27th October 1998
Date of Judgment: 27th October 1998

JUDGMENT

Power, V.-P. (giving the judgment of the Court):

The applicant faced 25 charges, 23 were charges of obtaining property by deception and 2 were of evasion of liability by deception. He pleaded not guilty and was found guilty on all charges after trial before Judge Candy. He was sentenced to imprisonment for 4½ years. He now seeks leave to appeal both against the convictions and the sentences.

The applicant was a partner in P & L, an entity which traded in diamonds. From 14th March 1996 to 14th May, a period of 2 months, the applicant obtained from 7 suppliers a total of about $7,000,000 in diamonds, for none of which he paid. There were only two transactions in March involving $750,000, there were 12 in April involving over $3,000,000, and there were 11 in May involving, again, more than $3,000,000. The total was about $7,000,000.

It was the prosecution case that when undertaking to pay for or return the diamonds, he knew he would not be able to pay for them or was reckless as to

whether or not he would be able to do so. Once a trader such as the applicant is accepted by diamond merchants as trustworthy, diamonds are provided to him on trust prior to his effecting a sale thereof after which he pays the merchant. As regards the first of the complainants, Billion Stars, they issued a receipt and bailment notice in each case which was signed by the applicant, in which he undertook to return the goods or to buy them. This set out payment terms of 90 days and, to confirm the sale, Billion Stars issued an invoice which also gave a payment term of 90 days.

The second complainant, Dia Impex, seems simply to have issued an invoice with a payment term of 90 days. But it was the evidence that it is generally accepted in the trade that the dealer has an option to return the stones.

The third complainant, Sanil Trading, issued an invoice with 90-day payment terms but this invoice states that there is only a sale "when we, the said owner, shall agree to such sale and a bill of sale rendered thereby".

Danhill, the fourth of the complainants, simply issued an invoice setting out the amount and the due dates some 90 days after the date of the invoice.

There was, as far as we can discover from the appeal bundle, no invoice relating to the single dealing with Span Impex.

Queensources, the sixth of the complainants, simply issued invoices, three of which required payment in 30 days. The fourth gave only 4 days for payment.

Jin Gems, the seventh of the complainants, issued both a receipt and bailment notice stating the bailment ceased only on return of the gems or payment, and it also issued an invoice giving 90-day terms.

The applicant gave evidence in which he did not contest that he had received the stones upon undertaking to return or pay for them. He said that the partnership was in some financial difficult and that he had, from 11th March

1996, on 21 separate occasions, pawned diamonds in Macau. He said that the partnership was owed considerable sums of money - $1,760,000 by Glamour Trading, $8,340,000 by a Mr. Cheng Kwok-ming and other amounts by Techon and Granham Trading. It was his evidence that the partnership was trying to trade its way out of difficulties and that when he received the diamonds, he genuinely believed that he would be able to return or pay for them.

The trial judge made the following findings:

> "By February 1996 it is clear that P and L were having cashflow problems and that at this stage they were asking some of their suppliers to hold on to the cheques, to not present them yet, and that some amounts due on foot of cheques originally presented, were in fact paid off by cash. Of course, the suppliers did not care particularly in what manner they were paid as long as they were paid.
>
> So clearly the partnership was in some difficulty by February in terms of cashflow. By 11 March P and L were pawning diamonds. That can only have been to produce quick cash. No matter how much the diamonds realised from pawning, it could not have been anything approaching their full market or trade value. When you take into account the debts which P and L were owed by some of the persons to whom they supplied, together with the situation in which they found themselves of having to re-negotiate with their own suppliers, taking that into account with the fact of pawning diamonds, it seems to me that the only inference that can be drawn by the stage that the pawning took place was that this was a fairly desperate measure to produce quick cash to enable P and L to pay off some of their own suppliers, and that is so even though P and L may have been running their own business on a cash basis. They were still dealing with their suppliers on a credit term basis. When one looks at the pawning in the context of the trade, it seems clear that if the other suppliers were aware of the defendant's pawning, they would have been very wary indeed of doing further business with P and L.
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> On top of all that, from the middle of April the defendant was coming under increased pressure from LIN of Billion Stars for payment and was eventually told by Mr. Lin that Lin would no long deal on credit terms with P and L. The defendant's position was that he would pay when he himself was paid. While that may well have been so, the liability for P and L to pay their own suppliers still existed and still existed within the terms of the arrangement between P and L and the other suppliers.
>
> Miss Kwok (Queensources) was promised payment in cash for the two large diamonds having been pressing for cash, and then being told she would receive a cheque in due course or would receive cash in a week's time. She never got payment, and even when Mr. Lin was pressing for cheques he was put off with various excuses as to why a cheque could not be provided by P and L.
>
> While the prosecution witnesses, or some of them at least, were aware that P and L had a cashflow problem, they were not given any details of the large amounts of money which P and L were apparently owed, according to the defendant. No doubt these very large debts which the defendant gave evidence of would have led to a cashflow problem, certainly having come on top of the $1.76 million debt which was

left by Glamour since April 1995, and given the precarious nature of the way that business was transacted within the diamond trade. It seems to me that on any view the defendant should have been anxious about his ability to pay in all of the circumstances.

I would have thought that, on an objective view, a reasonable diamond trading finding himself in that position would at least have an inkling of the possibility that, if he were not paid for the goods which he had sold on, he was not going to be in a position to pay for the goods with which he had been supplied. On the defendant's evidence he was owed a very large sum of money, but what did he do in relation to the debt by Glamour? He really did nothing at all except to accept some vague promise by Mr. Koo that he would be paid sums of money such as Koo could afford whenever he could afford it.

In relation to Tsang Kwok-ming, the man owing the largest amount of money of all, he sent Lux (his partner) to look for him in Macau and when he could not be found, that was it, he could not be found. He did not take legal action, he did not hire debt collectors to check the whereabouts of Tsang, he did not factor the debts.

Instead he went to London with Lux to contact Richard Wong whom he said owed him a large amount of money. He did not take legal action against Richard Wong when he found that Richard Wong could not pay. He did not hire debt collectors in England, nor did he take any legal action to recover the debt in England. What he did do was to go to the police station together with Leung to make a complaint which, not surprisingly, was not taken up by the British police since it was based upon an arrangement which had been made in Hong Kong.

The defendant says that he honestly believed that he could continue trading right up to the moment that he left for the UK. I have to consider that contention made by the defendant in the context of all of the evidence.

From February he had a cashflow problem. From that point onwards he was being pressed, specifically by Mr. Lin in respect of many transactions, and also by the other suppliers. He was pawning diamonds for a quick cash return and he was still operating his bank account more or less on a cash hand-to-mouth basis. Would it not have been a simple matter to at least apply to his bank manager for overdraft facilities? I would add that the bank would have looked at his bank accounts and seen that they were conducted in a reasonable manner at least. He was never largely overdrawn and even short-term overdraft facilities would have been an aid to the defendant in his difficulties. Of course, it is by no means certain that he would have been granted overdraft facilities, but the fact remains he did not even ask and, as I have already said, the pawning of diamonds can only be seen, in the light of the whole situation, as a last desperate measure to raise cash.

Given these circumstances it seems to me that upon any reasonable view of the circumstances, any reasonable diamond trader should have had an inkling at the very least of impending disaster, and that the defendant himself in particular should have had the same warning signals sounding in his mind. Yet the defendant continued to operate in the same way by trading in diamonds on foot of post-dated cheques, or the promise of payment by way of a cheque or cash in the forlorn hope that all would turn out satisfactorily at the end of the day and that he would be able to trade his way out of the difficulty, or that he would in fact be paid at some stage by those who had already defaulted on payment.

He did not inform his suppliers of the extent of his problem nor did he give them any detail of his problem. He gave excuses when pressed for payment or when pressed for cheques.

In all of the circumstances, notwithstanding the practice in the trade, I am satisfied on the evidence that the only inference which can be reasonably drawn from the defendant's actions in the circumstances, is that the defendant was reckless, within the specific meaning of that word given to it in law, as to whether or not he would be in a position to meet the cheques when presented on the due date. Things were bad in February 1996 and getting worse and the defendant's stated belief that he could continue trading was no more than a vague and forlorn hope that things would turn out all right in the end.

I am satisfied therefore that there was a deception practised by the defendant, a reckless deception, when handing over the post-dated cheques or when promising payment within the credit terms allowed. It was reckless of the defendant to think that he would be in a position to pay when the cheques were presented for payment, or that he would be able to pay either in cash or by post-dated cheque when the goods were handed to him upon bailment. The same recklessness as to the situation was present also on 22 May when he told Mr. Lin that the two cheques which had already been given to Mr. Lin would be paid for by cash by the defendant.

Did these deceptions operate on the mind of the witnesses who passed the goods to the defendant? I find that they did. These were operative deceptions. Given the nature of the trade, the method of trading, and given the circumstances in which the defendant actually was, I am satisfied that these were deliberate in the sense that they were made with the recklessness as to the ability to pay and that the ability to pay was what mattered to the witnesses who were supplying the diamonds.

The witnesses who were given cheques were entitled to expect and did expect to that those cheques, when presented for payment in the ordinary course of banking, would be honoured. The witnesses who handed over the diamonds on consignment or not receiving any cheque in return, were entitled to expect and did expect to be paid either in cash or by cheque within the credit terms agreed between them and the defendant.

I am satisfied that each of the witnesses would not have handed over the diamonds had they known the defendant's true position and had they been aware of the likelihood or the reasonable possibility that the cheques which they were given would not be met or where not given cheques that they would never get a cheque, nor get payment in any form.

I have held therefore that there was a deception which operated on the minds of the witnesses. The prosecution however also has to prove that the acts of the defendant amounted to dishonesty on his part and in this regard the prosecution has to prove the dishonesty to no less a standard, that is beyond reasonable doubt.

The English case of Ghosh [1982] QB 1053 gives the tests to be applied to the circumstances to see whether or not there was dishonesty. Firstly, the behaviour complained of, would it have been seen to be dishonest by an ordinary person, by a reasonable man; and secondly, if it was, then did the defendant know that it was dishonest? The prosecution is relying on essentially the same facts to show dishonesty as they relied on to show deception, and looking at the situation as I found the facts to have proven the situation to be, I am satisfied certainly that a reasonable

person, the ordinary man in the street, would have said that this course of conduct was dishonest.

Given the actions of the defendant in the circumstances in which he found himself, I am satisfied that the only possible conclusion, using both the subjective and the objective tests, is that the defendant did know that what he was doing was dishonest and I am satisfied and find beyond a reasonable doubt therefore that the defendant was guilty of dishonest behaviour in the whole course of the transactions to which this case refers.

Therefore, on that basis, the defendant is convicted on each of the charges."

The first of the Grounds of Appeal that has been argued today by Mr. Ching Y. Wong, S.C., with him Mr. David Ma and Mr. Herbert Au Yeung, is that the judge erred in finding that the applicant's stated belief that he could continue trading was no more than a "vague and forlorn hope", and erred in finding that the applicant was reckless as to whether or not he would be in a position to meet the post-dated cheques when presented on the due date.

We are satisfied that there was ample evidence for the judge to make the first finding. He had heard all of the witnesses and had, particularly, heard the applicant give his evidence. The finding depended in very large part upon his assessment of the evidence of the applicant. The applicant was plainly, day by day, digging a deeper hole of debt. In our view it was clearly open to the judge to characterize the hope which the applicant said he had as one which was both vague and forlorn. We will consider recklessness when examining the second ground to which we now turn.

In Ground 2, it was urged that there was a material irregularity in that the judge failed or failed sufficiently to consider that the mens rea required to be proved in respect of all the charges was *Cunningham* recklessness and not *Caldwell* recklessness, and to consider whether what the applicant did amounted to *Cunningham* recklessness.

The argument is that the judge found no more than the kind of recklessness that is referred to in *The Metropolitan Police Commissioner v. Caldwell, (1982) A.C. 343,* i.e. proceeding with a risky course of action in

circumstances where the person has not been subjectively aware of the risk, and that such a course of action is not criminal and would only become criminal if there was actual subjective awareness of the risk.

Even if we accept that to be so, it does not, we are satisfied, assist the applicant. The judge, in the lengthy passage which we have set out, found an actual awareness of the risk on the applicant's part as he was satisfied that his stated belief was not a genuine one but was no more than a vague and forlorn hope. He was satisfied that there was no rational belief on the part of the applicant who was simply blundering on in the forlorn hope that the partnership would somehow survive.

Accepting that the appropriate test is a subjective one, we suggest that the most helpful statement of that test is propounded in *Linda Irene Stains,* 60 Cr. App.R. 160. There, James L.J., at p.162, said:

> "This court accepts the contention put forward that in this section 'reckless' does mean more than being careless, does mean more than being negligent, and does involve an indifference to or disregard of the feature of whether a statement be true or false."

We are satisfied, applying that test to the present circumstances, that the findings of the judge clearly involved a finding of an indifference by the applicant as to whether or not the statements which he was making that he would pay or return the diamonds were true or false.

When arguing this ground particular reliance was placed upon the passage which forms part of that which we have just read in which the judge said:

> "Given these circumstances it seems to me that upon any reasonable view of the circumstances, any reasonable diamond trader should have had an inkling at the very least of impending disaster, and that the defendant himself in particular should have had the same warning signals sounding in his mind."

It is submitted that the use of the words "should have had" indicates that the judge was not satisfied that the applicant actually did have an inkling of

impending disaster but was saying that if he had been reasonable he would have had such an inkling. It is submitted that this wrongly applied an objective test. We cannot agree. When the whole passage is read, it is clear that the judge was satisfied that the applicant well knew that there was a real likelihood that he would not be able to pay for the diamonds or was, at the very least, indifferent as to whether or not he would be able to do so. This is made clear by the words which follow the passage which we have just read where the judge said:

> "Yet the defendant continued to operate in the same way by trading in diamonds on foot of post-dated cheques, or the promise of payment by way of a cheque or cash in the forlorn hope that all would turn out satisfactorily at the end of the day and that he would be able to trade his way out of the difficulty or that he would in fact be paid at some stage by those who had already defaulted on payment."

We refer also to the passage which follows shortly thereafter where the judge said:

> "Things were bad in February 1996 and getting worse and the defendant's stated belief that he could continue trading was no more than a vague and forlorn hope that things would turn out all right in the end."

The judge was clearly applying a subjective test.

There is nothing in Ground 2.

We turn then to Ground 3 which is as follows:

> "The Learned Deputy District Judge misdirected himself on the Ghosh test in determining whether or not the Prosecution had proved 'Dishonesty', namely:
>
> (i) in respect of the first limb of the test,
>
> (a) wrongly assessing the applicant's behaviour with reference to whether '… the behaviour complained of, would it have been seen to be dishonest by an ordinary person, by a reasonable man …' instead of 'whether according to the ordinary standards of reasonable and honest people (in the diamond trade) what was done was dishonest'; and
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> (b) in finding the applicant's course of conduct to be dishonest, wrongly applied the standards of '… a reasonable person, the ordinary man in the street …'
>
> (ii) in respect of the second limb of the test,
>
> (a) wrongly stating that the test was 'did the Defendant know that what he did was dishonest' instead of 'whether the defendant himself must

have realised that what he was doing was, by the standards (of the reasonable and honest people in the diamond trade), dishonest', thereby wrongly failing to consider the standards of reasonable and honest people in the diamond trade in respect of the applicant's acts; and

(b) wrongly 'using both the subjective and the objective tests' to infer that the applicant knew what he was doing was 'dishonesty', when only the subjective test was relevant and applicable."

It is necessary to look at the law as it is set out in *Ghosh* when considering this submission. The statement appears at p.1064 where Lord Lane C.J. said:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did."

The argument placed before us today is that it was wrong to have applied the first limb of the *Ghosh* test by asking what a reasonable man, the ordinary person, would have thought, given that such a person would know nothing about the peculiar and lax factors adopted by one and all in the diamond wholesale trade, as to whether what the applicant did was dishonest. This, it is submitted, was tantamount to directing a jury to ignore the evidence about the practices of the diamond wholesale trade in coming to a decision on the dishonesty issue.

It is argued further that since this was dishonesty in relation to the obtaining of diamonds in the course of wholesale trading in diamonds, the first limb of *Ghosh's* test ought to have been enlarged so that it was asked whether, according to the ordinary standards of reasonable and honest people in the diamond wholesale trade, what was done by the defendant was dishonest.

It is argued finally that when stating the second limb of the *Ghosh* test, as the learned judge did, namely did the defendant know that it was dishonest, he had wrongly stated the test in *Ghosh,* as he had left out the words according to the standards of reasonable and honest people in the diamond wholesale trade.

The tests enunciated in *Ghosh* have, of course, to be applied in the context of the factual matrix that has been proved, i.e. the business world in which the parties were operating. There are not, however, different standards of honesty applying in the business world and ordinary everyday life. There is no special standard of honesty applicable to the diamond trade. The test is what reasonable and honest people would think was honest, taking into account the way the diamond business is conducted. We have no doubt that this was the test which the judge applied. Indeed, although he did not so state when he was considering the *Ghosh* tests, it was clear from what he said when considering recklessness that he was looking at the evidence against the background of the business transactions which were at the core of the matter. He there said:

> "In all of the circumstances, notwithstanding the practice in the trade, I am satisfied on the evidence that the only inference which can be reasonably drawn from the defendant's actions in the circumstances, is that the defendant was reckless ..."

The judge, we are satisfied, correctly applied the first limb of the *Ghosh* test.

Further we find no merit in the suggestion that the judge, when applying the second limb, wrongly stated that test by leaving out the words according to the standards of honest and reasonable people "in the diamond trade". As we have said above, the judge when dealing with the first limb of *Ghosh* correctly applied the standards of reasonable, honest people to the factual matrix with which he was dealing and we have no doubt that when applying the second limb he was satisfied that the defendant did know what he was doing was dishonest by those standards. His reference "to the subjective and objective tests" was not an indication that he had muddled the tests but indicates rather that he was applying the proper test to each limb.

Ground 4 contends that the judge erred, when considering the first limb of the *Ghosh* test, in his finding that the applicant's behaviour was dishonest. It is submitted that the judge somehow confused himself by looking at a compounded wrongdoing which counsel characterized as "reckless dishonesty". We have no hesitation in rejecting that submission. The judge quite clearly dealt with recklessness when he was considering that word as applied by the section of the Theft Ordinance, and he quite clearly, as we have just indicated, considered dishonesty when he came to examine the test set down by *Ghosh.* It is true that the evidence which went towards recklessness and that which went towards dishonesty was very much the same but we are satisfied that the judge in no way confused these two issues, that he dealt properly with them and that he came to correct conclusions in relation to each.

There is, for the reasons which we have set out, nothing of materiality in any of the grounds the applicant advanced and the application for leave to appeal against conviction is, therefore, refused.

We turn now to consider the application for leave to appeal against sentence.

The judge said:

> "You have been convicted after trial of a total of 24 charges, the majority of which involved obtaining property by deception. Two of them are for evasion of liability by deception. The total amount of money involved in all of the charges is in excess of $14 million. The maximum sentence for each of these type of offences is a period of 10 years' imprisonment."

He went on to say:

> "Had the offences of which you have been convicted been premeditated or involved a breach of trust in the *Barrack* sense, which I have already referred to, then I am satisfied that the staring point for sentence would have been 6 years' imprisonment.
>
> Since I found you guilty on the basis of recklessness rather than premeditation, I will take a lower starting point and I take 5 years as the starting point in this case.
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> You have made partial restitution in relation to two of the persons you dealt with and while the amount is small in comparison to the total amount owing, I will

take it, as I said, as indicating some remorse but it is limited in value and I can allow a reduction only of 6 months on the sentence in relation to that particular factor.

Clearly you are of good character and have a clear record until now but that fact alone is not a reason for reducing the sentence. The late efforts by your family to make restitution on your behalf do not amount to mitigation, nor can you claim any reduction of sentence on account of an early plea of guilty to the offences. Lastly, the state of health of your mother is not a matter which I can take into account as mitigation.

I have considered whether a suspended sentence can be imposed in this case and I am satisfied, given the nature of the offences, the number of the offences and the amount involved, that a suspended sentence would not be appropriate."

The judge then imposed a sentence of 4½ years on each charge to run concurrently.

Mr. Ma, who has argued the application for leave to appeal against sentence, firstly points out the error made by the judge when he said that a total amount in excess of $14 million was involved. We do not know whether this was a slip on the judge's part or whether he was in error in his addition. However, the matter was not of the importance which it might at first sight seem to have been as the judge went on to indicate that his assessment of sentence was based upon *Chow Tak-ming,* which matter involved slightly less than the amount of about $7 million which is involved in the present case. We are satisfied, therefore, that nothing can be made of that incorrect statement by the judge.

The first of the Ground of Appeal was that the starting point of 5 years was in all the circumstances excessive. Before dealing with that, we feel it pertinent to state that we do not agree with Mr. Ma's contention that the offences did not involve breach of trust. The judge, it is true, did say that it was not breach of trust in the *Barrack* sense. However that may be, there was, in our view, a grave breach of a high degree of trust which was placed in the applicant by the merchants with whom he was dealing. Diamond trading, as it is conducted, is predicated upon trust. It would, in its present form, collapse if the merchants were not prepared to put that high degree of trust in the traders to whom they give the diamonds. We are satisfied that in all of the circumstances

the starting point of 5 years was not excessive.

The second ground is that the judge erred in not giving the applicant a discount for his previous good character. The judge considered good character but was satisfied, given the seriousness of the offences charged, that it was not appropriate to make any reduction in that regard. He was entitled to approach character in that way.

The third ground argued is that 6 months' imprisonment for remorse was in all the circumstances too low. We are not sure that the 6 months was given for remorse. The judge said he was giving it because of partial restitution. Again, we are not sure exactly what is meant by that as we find it difficult to see that there was any restitution in accordance with the usual meaning of that term. The applicant may well have been fortunate to obtain the 6 months discount which he did.

The sentence was a proper one and the application is, therefore, refused.

(N.P. Power)	(Simon Mayo)	(M. Stuart-Moore)
Vice-President	Justice of Appeal	Justice of Appeal

Mr. Robert S.K. Lee, S.A.D.P.P. (D.P.P.) for the Respondent.

Mr. Ching Y. Wong, S.C. leading Mr. David W.K. Ma & Mr. Herbert Au Yeung instructed by Messrs. Chung & Kwan for Applicant